NO. 82-1354

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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N. H. NEWMAN, ET AL.,

Petitioners,

UNITED STATES OF AMERICA, ET AL.,

Amicus Curiae,

v.

STATE OF ALABAMA, ET AL.,

Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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# BRIEF OF RESPONDENT CHARLES A. GRADDICK IN OPPOSITION TO THE WRIT

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## QUESTION PRESENTED

ARE THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS IN CONFLICT WITH THE DECISION OF THE ELEVENTH CIRCUIT THAT THE DISTRICT COURT WRONGLY DISREGARDED TIME HONORED CONTEMPT PROCEDURE TO ENFORCE A CONSENT DECREE REQUIRING THE REMOVAL OF STATE PRISONERS FROM CITY AND COUNTY JAILS, AND IMPERMISSABLY INTRUDED INTO STATE AFFAIRS BY SELECTING AND RELEASING SEVERAL HUNDRED PRISONERS TO PAROLE STATUS TO CREATE SPACES IN THE ALABAMA PRISON SYSTEM?

## PARTIES

The petitioners are N. H. Newman, Jerry Lee Pugh, and Worley James, the named plaintiffs in the courts below for themselves and as representatives of a class composed of all persons presently confined by the Alabama Department of Corrections or who may be so confined in the future.

The respondents are Charles A. Graddick, Attorney General of Alabama; and Fred Smith, Commissioner of the Alabama Department of Corrections. Commissioner Smith was automatically substituted as a party pursuant to Rule 25(d), Federal Rules of Civil Procedure, when he assumed office on January 17, 1983. George C. Wallace, Governor of Alabama, contrary to the assertions of petitioners, is not a party. His predecessor Fob James, was a party to the litigation by choice as Receiver of the Alabama Prison System, not as a party defendant, and Governor Wallace has not assumed the receivership.

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## DECISIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 683 F.2d 1312 (11th Cir. 1982) and a copy is attached to the Petition for

Writ of certiorari as Appendix A.[1] (A.1). The order of the United States District Court for the Middle District of Alabama is not reported and a copy is attached to the Petition for Writ of Certiorari as Appendix C. (A.19).

## JURISDICTION

Petitioners have invoked jurisdiction under 28 U.S.C. §1254(1).

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[1]Respondent adopts by reference the Appendix to the Petition for Writ of Certiorari. Respondent will adhere to the Appendix citation form and pagination adopted by petitioners.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Amendment VIII to the Constitution of the United States prohibiting cruel and unusual punishment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

made applicable to the states by Section 1 and 5 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This case also involves Amendment X to the Constitution of the United States which reserves to the state and to the people the right to incarcerate for the public welfare those who have been lawfully convicted of serious crimes:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

## STATEMENT OF THE CASE

This litigation which began in 1971 involves three separate lawsuits, now consolidated, brought by inmates under 42 U.S.C. §1983 and 28 U.S.C. §1343(3) to redress constitutional violations in Alabama prisons ranging from inadequate medical care to institutional violence. See Newman v. Alabama, 349 F.Supp. 278 (N.D. Ala. 1972), aff'd, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975); Pugh v. Locke, and James v. Wallace, 406 F.Supp. 318 (N.D. Ala. 1976), aff'd with modifications sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. denied in relevant part, 438 U.S. 781 and 438 U.S. 915 (1978).

The State of Alabama, the Governor of Alabama, and the Alabama Board of Corrections though originally named as defendants, have

been dismissed as parties during the course of the litigation. Alabama v. Pugh, 328 U.S. U.S. 781 (1978); Newman v. Alabama, 559 F.2d at 291-292.

In 1976 the district court in an effort to reduce overcrowding ordered that: "The number of inmates in each institution in the Alabama penal system shall not exceed the designed capacity for that institution." Pugh v. Locke and James v. Wallace, 406 F.Supp. at 332. Yet during the period from 1976 to the present Alabama, like every other state, experienced an unprecedented rise in the number of persons sentenced to prison. This increase combined with the court imposed limitation on prison population resulted in a backlog of state prisoners in city and county jails throughout Alabama. Newman v. Alabama, 466 F.Supp. 628, 630 (N.D. Ala. 1979).

Faced with continuing problems in the Alabama prison system and a backlog of state prisoners in city and county jails, Fob James, after assuming the office of Governor of Alabama on January 17, 1979, requested the district court to appoint him Receiver of the Alabama prison system. The district court granted his request, appointed him Receiver, and charged him with bringing the system in conformity with the court's decrees. Newman v. Alabama, 466 F.Supp. at 636.

Some 20 months later on October 9, 1980, the district court approved and signed a consent decree in which Receiver James and Joe Hopper, Commissioner of the Alabama Department of Corrections, agreed to reduce periodically the number of state prisoners in city and county jails until September 1, 1981, when none were to remain.

But the State of Alabama in 1981 experienced a 24.8% increase in its prison population, the largest in its history and the largest percentage increase of all the states for 1981. See Bureau of Justice Statistics Bulletin, "Prisoners in 1981" (May, 1982). So rather than steadily decreasing as the consent decree required, the population of state inmates in city and county jails actually increased throughout the early months of 1981. (A.4).

The petitioners took no steps to compel compliance with the consent decree. (A.4). They did not move the district court to order the Receiver and the Commissioner to show cause why they should not be held in civil contempt for violating the decree. (A.4).

Rather, on March 9, 1981, petitioners filed a "Motion to Require the Provision of Sufficient Funds for Compliance with the October 9, 1980, [consent] Order or the Release

of Members of the Plaintiff Class Until There is Compliance." (A.4). The motion asked the district court to direct the state to provide funds sufficient to build new prison facilities that would alleviate the overcrowding in county jails. (A.4). Alternatively, the motion requested the release from state custody of 200 prisoners a week until no state prisoners remained in county jails. (A.4).

A hearing was held on May 18, 1981, on petitioners' motion at which it was stipulated that the overcrowding of state prisoners in county jails had not abated. (A.4). The petitioners abandoned their request for prison construction funds[2] and asked the court

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[2]As of May 2, 1981, one new prison was under construction, two additional new prisons were planned (they are now under construction), and additional construction and renovations were underway to add additional spaces to existing facilities.

for immediate relief from the overcrowding. (A.4).

On May 20, 1981, the district court ordered the Department of Corrections to submit to the court a list of 250 prisoners "least deserving of further incarceration", and additional lists, each with the names of 250 prisoners, every two weeks for a period of eight weeks.[3] (A.5).

Then, on July 15, 1981, the district court in a written order named 400 inmates to be released; ordered that on July 24, writs of habeas corpus issue for these prisoners; and accelerated the parole eligibility dates of 50 others. (A.5-6). On

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[3]The record does not so reflect but the Department of Corrections undoubtedly complied with this order, at least in part.

July 22, the court amended its July 15 order by reducing the number of inmates to be released on habeas corpus to 277. (A.6). Receiver James and the Commissioner released the designated prisoners, (A.6), over objection of the Attorney General.[4]

Despite the release of 277 prisoners, the plaintiffs remained dissatisfied with the overcrowded conditions of the city and county jails, and again, rather than seeking to compel the Receiver and the Commissioner to comply with the October 9, 1980, consent

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[4]The Attorney General sought to stay the release of these prisoners but a stay was denied by the district court, the Eleventh Circuit Court of Appeals and this Court. Graddick v. Newman, 453 U.S. 928 (1981). The Attorney General appealed the release of these 277 prisoners to the Eleventh Circuit Court of Appeals, but the Court of Appeals treated the matter as moot. (A.7). The July 15 order is not before this Court on petition for writ of certiorari.

decree, they moved the district court to release more prisoners. (A.6). This motion was heard on November 12, 1981, when it was stipulated that approximately 1500 state prisoners remained in city and county jails.[5] (A.6).

On December 14, 1981, the district court ordered the release of 352 named inmates; they were to be released December 22, 1981. (A.6). This order differed from the

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[5]There were 1800 state prisoners in city and county jails in September, 1978. Newman v. Alabama, 466 F.Supp. at 630. It was stipulated at the hearing on May 18, 1981 preceeding the first release that there were 1606 state prisoners confined in city and county jails. Newman v. Alabama, No. 3501-N (M.D. Ala., order entered July 15, 1981). As of the recent compliance hearing held January 3, 1983, there were approximately 1200 and none had been there more than one year except those prisoners who had jobs in the jails and wished to remain. Id. Testimony of Joe Hopper January 4, 1983.

one previously issued on July 15, 1981, in three respects: first, the court did not issue writs of habeas corpus; second, the court placed the releasees on parole, subject to the parole authority of Alabama law; and and third, the court ordered that all unreleased inmates who would be eligible for parole within six months of the date of its order be considered for parole immediately. (A.6-7).

The Attorney General, and this time also the Governor and the Commissioner, objected to the release of these prisoners and moved the district court to stay the release pending appeal; their motion was denied. (A.7). They then applied to the Eleventh Circuit Court of Appeals for a stay pending appeal, which was granted. (A.7).

An appeal was taken to the Eleventh Circuit Court of Appeals, and on August 9, 1982, the Court of Appeals vacated the

the district court's order releasing the prisoners and remanded the case for further proceedings.

The Court of Appeals held (1) that the petitioners had made no showing that the Receiver and the Commissioner, if adjudged in contempt for violating the consent decree, would not respond to any of the traditional sanctions available to the court to coerce compliance; (2) that the plaintiffs were not entitled to a completely new injunction whose issuance depended on a demonstration of inadequate legal remedy; and (3) that the district court erred in granting it. (A.12-13).

The Court of Appeals further held that even if the issuance of an injunction had been warranted, the district court abused its discretion by framing relief which unnecessarily involved the court in the state's

criminal justice system; overrode the division of authority between the Alabama Department of Corrections and the Board of Pardons and Parole; intruded upon Alabama's parole policy; and reduced prison and parole officials to mere functionaries in carrying out the court's commands. (A.13-14).

Petitioners sought a rehearing en banc. The Court of Appeals denied their petition for rehearing on October 19, 1982. On December 29, 1982, Justice Powell extended the time for filing a petition for writ of certiorari to and including February 14, 1983. Petitioners filed a petition for writ of certiorari on February 14, 1983.

## SUMMARY OF ARGUMENT

The backlog of state prisoners in city and county jails in Alabama has been caused by the latest impact of a social phenomenon that has affected this country since the early '50's. Alabama, like every state that has felt the impact of this phenomenon in its prisons in the last ten years, has staggered under the burden of housing ever increasing numbers of criminals brought to justice and sentenced to prison terms. Efforts by the Legislature of Alabama to meet the problem have only been overwhelmed by subsequent waves of sentenced prisoners, often with longer sentences because they have been caught repeatedly and the people of Alabama now seek only to incapacitate them, rehabilitation having failed.

Receiver James and Commissioner Hopper in agreement with the petitioners and the

district court sought to solve this problem by releasing prisoners who had already served some time. The court on motion of the petitioners further sought to insulate the Receiver and the Commissioner from this distasteful and unpopular action out of delicacy to their position. In so doing the court erred. The court entered an injunction directing the release of prisoners when the petitioners already possessed an adequate legal remedy in the form of the October 9, 1980, consent order enforceable through the court's contempt power, and abused its discretion by framing relief which was impermissibly intrusive on the state's prerogative to administer its prison and parole systems.

## ARGUMENT

The problems that have beset the Alabama prisons including the backlog of state inmates in the city and county jails are but the predictable result of the coming of age of the baby-boom generation, only now it is crowding prisons instead of maternity wards and schools.[6] Crime is almost as age-specific as driving, diapers, and dentures. Teenagers and young adults dominate crimes of violence and crimes of property. Nearly one-half of all the people arrested in this country are between the ages of 14 and 24. In 1960, the 14-24 age group included only fifteen percent of the population but accounted for sixty-nine percent of all arrests for serious crimes.

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[6]For a thorough and altogether enlightening analysis of the impact of the baby-boom generation on American society see Jones, Great Expectations: America and the Baby-Boom Generation (Ballantine Ed. 1980). Chapter 11 of this book is devoted to the crime boom and the information which follows concerning the impact of this generation on crime in America is taken from this chapter.

Compared to those 25 and over, the younger age group commits twice as many murders, five times as many forcible rapes, six times as many robberies, nine times as many larcenies, ten times as many burglaries, and twenty times as many car thefts. The peak age of violent crime in the United States is 18; auto thieves and burglars are 16; murderers are 20.

After 1960 millions of baby-boom children began flooding into the most crime-prone ages in society. In ten years the 14-24 cohort grew by more than fifty percent and thirteen million people, a larger increase than in the rest of the century before it. Its growth rate was six times the increase of all other age groups combined. Just as an increase in babies would mean a proportionate increase in the market for pacifiers, any increase in a social group with greater-than-average propensity for committing crime would yield a proportionate increase in the incidence of crime itself.

This is exactly what happened in the '60's and early '70's. The impact on the prisons, came slightly later. Since the early '60's criminal justice has been largely committed to rehabilitating young offenders. Those of the baby-boom generation who chose to commit crimes for the most part were not sent to prison when they were first caught. It is only since around 1976 when the prisons across the nation first began to experience substantial increases in the prison population that they have begun to be sentenced to prison terms for subsequent offenses.

The Alabama prison system, like the prison systems of its sister states, has been overwhelmed.

Mass release of prisoners by federal courts, however, is not the answer.

If there is not enough room in our prisons for all the criminals who should be there, then hard choices will have to be

made. If we must resort to selective incarceration to assure that at the very least we lock up the most dangerous, we must. But those who decide who is to be locked up and who is to be placed in alternative programs must be politically accountable, there is no acceptable margin for error or negligence. The district court should not have insulated Receiver James and Commissioner Hopper from the consequences of their actions. But the court did. And in so doing the court erred.

Though petitioners cite a number of cases as authority supporting the district court's action, only one, Hutto v. Finney, 437 U.S. 678 (1978), concerned prison conditions, and that case did not involve overcrowding or the release of prisoners. The cases petitioners cite, to the extent that they can be made applicable to this case, stand only for the proposition that the

district court's equitable powers are broad.[7] This is not disputed.

The problem, as the Court of Appeals has implicitly recognized, is that the district court's equitable powers are subject to certain established principals.

First, the nature of the remedy is to be determined by the nature and scope of the constitutional violation, and the remedy must, therefore, be related to the condition alleged to offend the Constitution. Second, the decree must be remedial in nature and designed as nearly as possible to restore victims to the position they would have occupied in the absence of the constitutional

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[7]The one exception is Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II) which petitioners discuss on page 8 of their petition for writ of certiorari. In addition to being authority for the proposition that the district court's equitable powers are broad, Milliken II sets out the principals which limit the district court's exercise of its equitable powers. See discussion in text at 23.

violation. Third, federal courts in formulating a remedy must take into account the interest of state and local authorities in managing their own affairs consistent with the Constitution. Milliken v. Bradley, 433 U.S. 267, 280-81 (1977) (Milliken II).

The district court never ascertained the existence of current constitutional violations from overcrowding in the city and county jails.[8] Nor did the district court ascertain whether the Alabama statutes on pardons and paroles, as written or applied, caused or contributed to unconstitutional

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[8]The district judge since being assigned the case on July 17, 1979, has not conducted evidentiary hearings or otherwise heard evidence regarding the conditions of confinement of state inmates in city and county jails.

overcrowding.[9]

Rather, the district court framed its release order in terms of "possible" constitutional violations:

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[9]Section 15-22-26 of the Alabama Code provides:

> No prisoner shall be released on parole merely as a reward for good conduct or efficience performance of duties assigned in prison, but only if the board of pardons and paroles is of the opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society.

Section 15-22-28(e) of the Alabama Code provides:

> The board shall not grant a parole to any prisoner who has not served at least one-third or ten years of his sentence, whichever is the lesser, except by a unanimous affirmative vote of the board.

> "This court is of the opinion that the constitutional rights of the plaintiff class are in jeopardy and that any substantial continuation of the incarceration of state inmates in the city and county jails would probably violate their constitutional immunity to cruel and unusual punishment." (Emphasis added.) (A. 22).

Absent an existing constitutional violation,[10] the district court was without authority to fashion a remedy, particularly one as extraordinary as the premature release of convicted criminals. Rhodes v. Chapman 452 U.S. 337, 349-50 (1981).

Morever, even if the district court had properly ascertained the existence of a current constitutional violation, the

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[10]Even if the conditions of confinement of state inmates in city and county jails were to rise to the level of cruel and unusual punishment on a long term basis, such conditions of confinement would not necessarily constitute cruel and unusual punishment on a temporary incarceration basis. Cf. Hutto v. Finney, 437 U.S. 678 (1978) (length of confinement in punitive isolation considered relevant in determining whether the confinement constituted cruel and unusual punishment).

district court would not have had the authority to order the release of prisoners under §1983. Prieser v. Rodrigues, 411 U.S. 475, 499-500 (1973). The prisoners selected for release by the district court were lawfully convicted and lawfully sentenced by the state courts of Alabama. They had no underlying right to release then, and they have none now. The position they and all other members of the plaintiff class occupy in the absence of any constitutional violation is incarceration.

The remedy to which petitioners were entitled, if any, was an injunction requiring the removal of state prisoners from the city and county jails. Cook v. Hanberry, 596 F.2d 658, 660 (5th Cir. 1979). This they already had in the form of the October 9, 1980, consent order. (A.8-9).

If the petitioners were unsatisfied with the removal of state inmates from the city and county jails they had available a

traditional equitable remedy in the form of a contempt proceeding which they could have initiated by moving the court to issue an order to the Receiver and the Commissioner directing them to show cause why they should not be held in civil contempt for failure to reduce the state prisoner population in city and county jails as required by the October 9, 1980, consent order. (A.9).

At the show cause hearing the Receiver and the Commissioner would have been entitled to demonstrate that they had complied with the consent order, or why they should not be adjudged in contempt, or if adjudged in contempt, why sanctions should not be imposed. (A.9). They would also have had the right to move the court to modify the consent order.[11] (A.9).

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[11]Changed circumstances such as an unprecedented increase in criminals brought to justice and sentenced to prison terms which make the timetables established in the October 9, 1980, order not reasonably achievable despite good faith effort would be grounds for modification. Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981).

When the petitioners sought the release of prisoners they made no showing that the Receiver or the Commissioner, if adjudged in contempt for violating the consent order, would not respond to any of the traditional sanctions available to the court to coerce compliance. (A.12). The district court was therefore not presented with a situation in which its contempt power might be ineffectual. (A.12-13). The petitioners also made no showing that members of the plaintiff class would suffer a continuing irreparable injury if prisoners were not immediately released[12] or that they had no adequate remedy at law, both of which are essential predicates for any new mandatory injunction like that which the district court issued. (A.11-12).

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[12]For the district court to have addressed the question of continuing irreparable injury it would have been necessary to inquire into the existing conditions of confinement in each and every county jail. See Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982) F.2d 328 (5th Cir. 1982).

## CONCLUSION

The decisions of this Court and other courts of appeals are not in conflict with the decision of the Eleventh Circuit vacating the district court's order releasing prisoners. The district court had neither the authority to release prisoners under §1983, nor the necessary basis for an entirely new mandatory injunction.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of the foregoing Brief of Respondent in Opposition to the Writ of Certiorari on the following attorneys by placing same in the United States mail, postage prepaid and addressed as follows:

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